Supreme Court, U.S.
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No. 95-974

In The Supreme Court Of The United States

October Term, 1995

Arizonans for Official English and Robert D. Park,
Petitioners

v.

State of Arizona; Maria-Kelly F. Yniguez; Jaime Gutierrez; and Arizonans Against Constitutional Tampering
Respondents

On Petition for a Writ Of Certiorari to the United States Court of Appeals for The Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 8, 1996

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REPLY

I. Respondents' "Public Concern" Test Conflicts With *Pickering*, *Rosenberger* and Other Decisions of this Court.

Respondents concede that "no one doubts the government's power to deliver a particular message or to regulate the content of its own speech." Opposition of Respondent Maria-Kelly Yniguez ("Yniguez Opp."), 15. Nevertheless, like the majority below, they propose that government's power be subject to a balancing test under *Connick v. Myers*, 461 U.S. 138 (1983) and *Pickering v. Board of Education*, 391 U.S. 563 (1968). Yniguez Opp., 16.

This Court's most recent explanation of the government's own speech rights was in *Rosenberger v. Rector and Visitors of Univ. of Va.*, __ U.S. __, 115 S.Ct. 2510 (1995). Nowhere in *Rosenberger* does this Court suggest

that a balancing test be employed where the government is the speaker. Moreover, in *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. __, 115 S.Ct. 2440, 2449 (1995), this Court noted that the government **does not risk** a free speech violation when it restrains **its own speech**. "[The government] would be liable for suppressing free exercise or free speech (a risk not run when the State restrains only its *own* expression)." *Id.*, (emphasis in original).

Since, under these cases, employees have no "personal stake in the words they utter when they speak for the government," App. 89a (Kozinski, J.), there is nothing to balance. Thus, the majority below's use of a balancing test conflicts with *Rosenberger* and *Capital Square* and should be reviewed.

Even if a balancing test were used, however, respondents' proposal would conflict with *Pickering*. If everything a public employee says to the public is a "matter of public concern," the *Pickering* test would forbid the government from prescribing how a public employee is to interact with the public. But *Pickering* does not require that government permit employees to deal with the public in any fashion they see fit. *See, e.g., Waters v. Churchill*, __ U.S. __, __, 114 S. Ct. 1878, 1886 (1994)(O'Connor, J., plurality op.)("[S]urely a public employer may . . . prohibit its employees from being 'rude to customers' . . . "). This Court should review this interpretation of *Pickering*.[1]

1 One commentator suggests it is the recipients of government services whose rights should be balanced in this case. Scott H. Angstreich, *Speaking in Tongues: Whose Rights At Stake?*, 19 Harv. J.L. & Pub. Pol'y 634, 640 (1996). Such an analysis would conflict with *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 466 (1979)(per curiam)(disagreement with public policy is to be registered at the polls).

II. The Effect of the Decision Below Is Widespread.

Respondents suggest that Arizona's Official English provision is "singularly unique . . . completely atypical and totally dissimilar," Yniguez Opp. 20, with a "purely local impact." Opposition of Arizonans Against Constitutional Tampering ("AACT Opp."), 15. In fact, Arizona's provision may be more detailed, but it is hardly unique.

Other State laws are similar in effect. For example, one of the newest State Official English declarations is New Hampshire's. 1995 N.H. Laws 157, *reprinted in* Appendix hereto ("Reply App."), 2A. The law is not like a declaration of a state folk dance, as Respondent Yniguez suggests. Yniguez Opp. 3, n. 2. Otherwise why would the Governor insist on an "exemption for public proceedings occurring between the State of New Hampshire and the Province of Quebec, instruction in foreign language courses in our education system, the promotion of international commerce," and so on? Gov. Stephen Merrill, Statement, May 31, 1995, 1, *reprinted in* Reply App., 5A.

As shown in the record of this case, the decisions below have already affected the political considerations of official English proposals in several states. Declaration of Cameron Whitman, May 3, 1990, ¶ 5 ("The effect of these [District Court] decisions has been to slow, and in at least one case, halt, progress on similar legislative proposals in other states"), *attached* to Motion for Expedited Consideration Under 28 U.S.C. § 1657 in Ninth Cir. No. 90-15546. Similarly, several amici indicate that the decision below will affect political efforts in Congress and the states. *See, e.g.*, Brief of the Washington Legal Foundation, et al., pp. 5-7; Brief of FLA-187 Committee, et al., pp. 1-2. In addition, as demonstrated by an opinion letter from California's Legislative Counsel to a member of the

state Assembly, *reprinted* in the Appendix hereto, current Official English proposals are being stifled by reference to the decision below. Reply App., 8A.

III. Respondents' Factual Complaints Are Misplaced.

Respondents complain that the Petition "distort[]s" the record and ignores the majority below's factual findings and certain stipulations entered into during discovery in 1988. Yniguez Opp. 4-8; AACT Opp. 5-6 ("procrustean treatment of the record"). Yet Respondents misunderstand the nature of this Court's factual inquiry on a constitutional review. Last term, this Court noted in *Hurley v. Irish-American Gay Group of Boston*, __ U.S. __, 115 S.Ct. 2338, 2344 (1995), that "[o]ur review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court."

Nor does this Court permit stipulations between parties to impede its examination of a law's constitutionality. *See, e.g., Lee v. Weisman*, 505 U.S. __, __, 112 S.Ct. 2649, 2659 (1992)("we shall not allow the case to turn upon this point" when stipulation that graduation was voluntary was offered to excuse Establishment violation).[2]

2 Even absent collusion between parties, determining constitutional issues based on early discovery responses may be difficult: Ms. Yniguez testified that she had entered into settlement agreements on behalf of the State in Spanish, a language which her supervisor and auditing agency could not understand. Reporter's Transcript of Proceedings ("RT"), February 13, 1989, Pp. 71-72. Counsel for Respondent Yniguez, trying to clarify the testimony, admitted that: "there is an instance which is agreed to in the stipulation where the only release that is signed by the claimants is in Spanish", although Ms. Yniguez prepared a translation. RT. April 27, 1989, p. 14. It is unclear whether the State knew this at the time it entered into the stipulation. RT, March 26, 1990, p. 46 (Mr. Ching for the State: "[W]e never said it's okay for her to sign the releases.").

The facts in this case are clear and unambiguous. For her own reasons, Ms Yniguez spoke and wrote in Spanish during the performance of her official duties. "Some of the persons with whom she communicates in the Spanish language also could communicate in the English language, but Kelly [Yniguez] communicates in the Spanish language because the emotive ideas and feelings which she desired to express were, *in her judgement* [sic] *and the exercise of her liberties*, best and most clearly expressed in the Spanish language." Plaintiff's and Defendants' Statement of Stipulated Facts ("Stipulations"), ¶ 13 (emphasis added). Similarly, Ms. Yniguez "has previously spoken both publicly and privately in Spanish to State employees concerning State business and matters of public *and private concern*." Stipulations, ¶ 14 (emphasis added). Thus, even accepting stipulations, the facts in this case are clear and sufficient for this Court's review.

IV. The Majority Decision Below Implicates Tenth Amendment Issues:

Respondent Yniguez suggests that this Court not consider the Tenth Amendment and notions of federalism since they were not raised explicitly below. Yniguez Opp. 19. This suggestion is unwise. The Petition points out that the majority decision below, resting on a novel interpretation of the First Amendment, implicates Tenth Amendment issues. Petition, 21-22. The case on which Ms. Yniguez relies, *Capital Square*, 115 S.Ct. at 2445, prohibits only discussion of issues other than those on which cer-

tiorari was granted; it does not require silence on issues implicated by decisions below.

V. The Founders Never Intended the First Amendment to Permit Public Employees to Ignore Government's Chosen Language.

Respondent AACT claims that "early political leaders recognized the close connection between language and religious/cultural freedoms, and they preferred to refrain from proposing legislation which might be construed as a restriction on these freedoms." AACT Opp., 6-11, 9, *quoting*, Shirley Brice Heath, "Language and Politics in the United States," in *Linguistics and Anthropology* (1977). At best, AACT's (and Heath's) historical analysis is incomplete.

During the Revolutionary War era, a nation's language was thought to be the essence of national culture. As Professor Simpson put it: "Language, in other words, is seen from the start as a potential element in constituting a political and cultural unity among the citizens of the new republic; or, if it goes wrong, a means of prescribing or perpetuating disorder." David Simpson, *The Politics of American English, 1776-1850*, 30 (1986) ("Simpson").

Hobbes wrote in 1651 that language was the major organizing principle of states and without it "there had been amongst men, neither Commonwealth, nor Society, nor Contract, nor Peace". T. Hobbes, *Leviathan*, 12 (1973 ed.). Locke wrote: "For Words, especially of Languages already framed, being no Man's Private possession, but the common measure of Commerce and Communication, 'tis not for any one, at pleasure, to change the Stamp they are current in." John Locke, *An Essay Concerning Human Understanding*, 512 (Nidditch Corr. Ed., 1979).

Long before the Revolution, the primacy of English was established. "[T]he English language dominated all

public life. It was the only official language and as such was used in the courts, the assemblies, and the press." J.R. Pole, *Foundations of American Independence: 1763-1815*, 18 (1972).

In 1780, John Adams wrote to the President of Congress, arguing that just as forms of government have an influence on language, so "language in its turn influences not only the form of government, but the temper, the sentiments, and manners of the people." John Adams, *The Works of John Adams*, Vol. 7, p. 249 (Charles Francis Adams ed., 1852). Adams suggested that the Americans should "force their language into general use". *Id.*, 250.[3]

The desire to maintain a common language can also be seen in *The Federalist, No. 2*, (John Jay) 94 (Benjamin F. Wright ed., 1961): "Providence has been pleased to give this one connected country to one united people — a people descended from the same ancestors, **speaking the same language**. . . A strong sense of the value and blessing of union induced the people at a very early period to institute a federal government to preserve and perpetuate it." (emphasis added).

Respondent AACT finds Pennsylvania's experience significant. AACT Opp., 8. James Wilson's speech on December 11, 1787, in the Pennsylvania Ratifying Convention illustrates the language beliefs of many Founders: "That language, sir, which shall become most generally known in the civilized world, will impart great importance over the nation that shall use it. The language of the United States will, in future times, be diffused over a greater extent of country, than any other that we now

3 In 1806, Daniel Webster, an active language revolutionary, predicted that, by 1940, more people would speak English than any other language, "not excepting the Chinese." Simpson, 66.

know." Library of America, "Debates on the Constitution," (1993), Vol. I, 866.

Thus, whether or not it was "improbable" that the Founders intended *private* choice of language to be covered by the First Amendment, AACT Opp., 8-9, it was *highly* unlikely that the Founders intended the First Amendment to permit a public employee to ignore an official language. To allow an individual employee to override a democratically-made choice of language for government would have ignored the natural course of American development and invited disaster.

CONCLUSION

This Court should grant the Petition and issue the Writ of Certiorari.

Respectfully Submitted,

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CHAPTER 157

HOUSE BILL - FINAL VERSION

0111L
95-0066
10/02

HB 326-FN-LOCAL

STATE OF NEW HAMPSHIRE

In the year of Our Lord
One Thousand Nine Hundred and Ninety-Five

AN ACT

requiring that all governmental business be conducted in English.

Be it Enacted by the Senate and House of Representatives in General Court convened:

157:1 *New Chapter; Official Language of New Hampshire.* Amend RSA by inserting after chapter 3-B the following new chapter:

CHAPTER 3-C

OFFICIAL STATE LANGUAGE

3-C:1Official State Language.

I. The official language of the state of New Hampshire shall be English. English is designated as the language of all official public documents and records, and of all public proceedings and nonpublic sessions.

II. For the purposes of this chapter, "official public documents and records" are all documents officially compiled, published, or recorded by the state.

III. For the purposes of this chapter, "public proceedings and nonpublic sessions" mean those proceedings and sessions as defined in RSA 91-A, and includes the information recorded at such proceedings and sessions.

3-C:2 *Exceptions.* The provisions of this chapter shall not apply:

I. To all public proceedings between the state of New Hampshire and the province of Quebec when, in the opinion of the state administrator involved in such proceedings, it may be necessary to conduct such proceedings between Quebec and New Hampshire wholly or partially in French, and to use official public documents and records during the public proceedings, which are written wholly or partially in French.

II. To instruction in foreign language courses, or other requirements of the state university system.

III. To instruction designed to aid students with limited English in a timely transition and integration into the general education system.

IV. To the promotion of international commerce, tourism, and sporting events.

V. When deemed to interfere with needs of the justice system.

VI. When the public good, public safety, health, or emergency services require the use of other languages.

VII. When expert testimony or witnesses may require a language other than English; provided, however, that for purposes of deliberation, decision making, or record keeping, the official version of such testimony or commentary shall be the officially translated English-language version.

3-C:3 *Employment.* No person shall be denied employment with the state or with any political subdivision of

the state based solely upon that person's lack of facility in a foreign language, except when related to bona fide job needs reflected in the exceptions listed in RSA 3-C:2.

3-C:4 *Construction*. This chapter shall not be construed in any way to infringe on the rights of citizens under the state constitution or the constitution of the United States in the use of language in activities or functions conducted in the private sector. No agency or officer of the state or of any political subdivision of the state shall place any restrictions or requirements regarding language usage for businesses operating in the private sector other than in official documents, forms, submissions, or other communications directed to governmental agencies and officers, which communications shall be in English as recognized in this chapter.

157:2 *Effective Date*. This act shall take effect 60 days after its passage.

Approved:June 1, 1995

Effective:July 31, 1995

STATE OF NEW HAMPSHIRE

OFFICE OF THE GOVERNOR

STEPHEN MERRILL

GOVERNOR

May 31, 1995

Today I have signed House Bill 326, intending to promote the use of English in conducting governmental business. I sign this bill to bring people together, not divide them. As with our proud French-Canadian neighbors who promote the usage of French, I trust that emphasis on the words we speak publicly may encourage our private reflection on the content of our words as well.

This bill raises the question as to whether we need to underscore national unity and societal cohesiveness with English language usage. It is language that crosses our ethnic, racial, national, and religious lines and allows diverse citizens to share their various cultural backgrounds. Having a common language allows all citizens to participate fully and equally in democracy, to share viewpoints, debate differences, and eliminate feelings of misunderstanding, isolation, and distrust.

I have insisted upon an exemption for public proceedings occurring between the State of New Hampshire and the Province of Quebec, instruction in foreign language courses in our education system, the promotion of international commerce, tourism, and sporting events, the administration of the judicial system, and when the public good, public safety, help, or emergency services require the use of other languages.

While the importance of multilingual individuals cannot be overstated, our taxpayers' money would be better

spent in increasing our instruction of the English language to new immigrants rather than duplicating government in multiple languages. The interest in a common language is supported by citizens from broad backgrounds, many of whom come from countries with official language laws and understand the necessity of a common language. English is our common language, not our universal language. Remembering that distinction will bring us together, not separate us.

Our interest in unifying our citizens through the use of our national language, English, does not discourage diversity. I will conduct State business in French, Spanish, and any other language that is appropriate under the circumstances. I hope native languages and dialects will be spoken in the home, at public events, and at other gatherings. They add to our rich culture and acknowledge our heritage.

It shall be clear that by passing this law, we do not limit State government in its efforts to support and encourage commerce with foreign nations and their citizens. New Hampshire has worked hard to promote international trade and to improve relationships with our Canadian neighbors in Quebec, among others. We hold those relationships dear, and they will grow in the coming years.

As the Governor to lead the first trade mission to Quebec, I learned the value of unrestrained communication between nations and people. As I announced then, New Hampshire Departments now require one member of each agency to speak French to French-speaking business people and citizens in an effort to acknowledge the strong relationship with the Province of Quebec. We will continue to do so.

This bill attempts to ensure that New Hampshire citizens and New Hampshire state government conduct most business through our common language. Some will find it curious that such a bill is even necessary. Once, speaking English was a desired goal, one that promoted communication, understanding, and assimilation. Our State has distinguished itself for over 200 years by successfully welcoming people from different culture. This bill will maintain that tradition in our State.

/s/

Stephen Merrill

Governor

LEGISLATIVE COUNSEL OF CALIFORNIA

BION M. GREGORY

Sacramento, California
January 23, 1996

Honorable Bob Margett

6028 State Capitol

English as the Official State Language - #455

Dear Mr. Margett:

Pursuant to your request we have prepared the enclosed measure relating to English as the official state language.

The proposed measure, if enacted, would require the state and its political subdivisions, among other things (1) to take all reasonable steps to preserve, protect, and enhance the role of the English language as the official language of the state, and (2) to provide that the state and its political subdivisions shall not be required to act in any language other than English. Hence, the proposed measure, if enacted, may infringe upon speech protected by the First Amendment to the United States Constitution and Section 2 of Article I of the California Constitution (*Yniguez v. Arizonians* [sic] *for Official English* (9th Cir.), 69 F. 3d 920).

If you wish further assistance with this measure, please contact the undersigned deputy.

Very truly yours,

Bion M. Gregory

Legislative Counsel

By: Diana G. Lim

Deputy Legislative Counsel